80-357

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1980

B.F. McMAHON, et al

Petitioners

v.

CITY OF VIRGINIA BEACH

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Paul M. Lipkin
Goldblat, Lipkin, Cohen,
Anderson & Jenkins, a
professional corporation
804 Plaza One Building
Norfolk, Virginia 23510
Counsel for Petitioners

THE QUESTIONS PRESENTED FOR REVIEW

a) Does a city ordinance requiring a homeowner to connect to the city water line deprive that homeowner of his property without due process of law where the homeowner has a well providing him with good and sufficient water?

b) Does a state statute enabling a city to pass an ordinance requiring the connection of premises with facilities provided for furnishing water contravene the due process clauses of the Fifth and Fourteenth Amendments as to those persons whose premises have their own water facilities?

c) Can a homeowner be required to pay to a city water connection fees when he neither wants the city water nor needs the city water?

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

Petitioners, B. F. McMahon, and others, whose names are listed in Appendix D (Virginia having no provision for class actions) pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case on June 6, 1980.

1. Material Proceedings and Opinions Below

Petitioners, B. F. McMahon, et al, (who are sometimes herein referred to as Homeowners) filed their Bill of Complaint against the City of Virginia Beach asking for a declaration that the mandatory water connection ordinance adopted by the City of Virginia Beach was unconstitutional.

Evidence was heard, ore tenus, and by stipulation on the 19th day of January, 1978. The case was argued before the Court and the trial Court rendered an untranscribed oral opinion on March 10, 1978.

A Final Decree (Appendix A) was entered on April 28, 1978 dismissing the Bill of Complaint for Declaratory Judgment and Injunctive Relief over the objection and exception of Petitioners.

Petitioners timely pursued their grievance to the Supreme Court of Virginia which agreed to hear their appeal. Upon briefs and oral argument, the Virginia Supreme Court

affirmed the lower Court. McMahon v. City of Virginia Beach, 221 Va.___, 267 S.E.2d 130, 133 221 VRR 106, 110 (1980) (Appendix C).

Hence this petition.

2. Jurisdiction

The decision of the Supreme Court of Virginia was rendered on the 6th day of June, 1980. This Petition follows within 90 days thereof. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3).

3. The Questions Presented for Review

a) Does a city ordinance requiring a homeowner to connect to the city water line deprive that homeowner of his property without due process of law where the homeowner has a well providing him with good and sufficient water?

b) Does a state statute enabling a city to pass an ordinance requiring the connection of premises with facilities provided for

furnishing water contravene the due process clauses of the Fifth and Fourteenth Amendments as to those persons whose premises have their own water facilities?

c) Can a homeowner be required to pay to a city water connection fees when he neither wants the city water nor needs the city water?

4. Pertinent References

a) Amendment V of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

b) Amendment XIV of the United States Constitution

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

c) Code of Virginia of 1950, as amended

§ 15.1-875. Water supplies and facilities. -- A municipal corporation may provide and operate within or without the municipal corporation water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of the inhabitants of the municipality; may contract with others for such purposes and services; may require the connection of premises with facilities provided for furnishing water; may charge and collect compensation for water thus furnished; and may provide penalties for the unauthorized use thereof.

No municipal corporation, after July one, nineteen hundred seventy-six, shall construct, provide or operate without the boundaries of such municipal corporation any water supply system prior to obtaining the consent of the county or municipality in which system is to be located; provided, however, no consent shall be required for the operation of any such water supply system in existence on July one, nineteen hundred seventy-six, or in the process of construction or for which the site has been purchased or for the orderly expansion of such water supply system.

In any case in which the approval by such political subdivision's governing body is withheld the party seeking such approval may petition for the convening of a special court, pursuant to §§ 15.1-37.1:1 through 15.1-37.1:7 of the Code of Virginia. (Code 1950 (Suppl.), §15-77.39; 1958, c. 328; 1962, c. 623; 1975, c.573; 1976, c.69.)

d) Code of Virginia of 1950, as amended

§ 15.1-873. Purposes for which powers conferred. -- A municipal corporation, in order to secure, preserve and promote health, safety, welfare, comfort, convenience, trade, commerce and industry in the municipality,

and among the inhabitants thereof, may exercise the powers and provide and operate the facilities and establishments set forth in this article. (Code 1950 (Suppl.), § 15-77.37; 1958, c.328; 1962, c.623.)

e) City Ordinance of the Code of the City of Virginia Beach, Virginia

Sec. 37-28. Connection required.

The owner of any dwelling or other building in which human beings live or congregate shall, whenever a public water line hereafter is made available by the city, connect such building or dwelling with such water line within one year after such line becomes available. The date of availability shall be that on which notice is given by publication or by mailing or delivering notice to the affected property. However, the director of public health may require connection within sixty (60) days if, in his opinion, a health hazard exists.

If, at the time of enactment of this section, a water line is already in the ground and capable of serving any property as defined, then the owner shall effect a connection thereto no later than May 1, 1978. However, the director of public health may require

connection within sixty days if, in his opinion, a health hazard exists.

It shall be unlawful for any person to occupy, lease or rent any premises in violation of this section. Each day of occupancy or use of any premises in violation of this section shall constitute a separate and distinct offense. (Ord. No. 753; Ord. No. 759; Ord. No. 828, 11-28-77)

5. Statement of the Case

On February 28, 1977, the City of Virginia Beach adopted its mandatory water connection ordinance, Section 37-28 of the City Code (set forth verbatim above). Section 15.1-875 of the 1950 Code of Virginia (set forth verbatim above) is the ostensible enabling act for such ordinance.

Homeowners, who installed their wells before the mandatory connection ordinance, are Virginia Beach homeowners living throughout the various residential areas in the City. Their wells average in depth from 50 to 165 feet which

is deep enough to avoid bacterial contamination from septic tanks. As stipulated to by the City, the quantity and quality of Homeowners' well water is good.

Feeling aggrieved by the passage of this mandatory connection ordinance the Homeowners, 243 in number, filed their Bill of Complaint for Declaratory Judgment and Injunctive Relief wherein they alleged that the ordinance was invalid as it "deprives the plaintiffs of the full use and enjoyment of their property... due process of law in violation of the 5th and 14th Amendment (sic) of the United States...." [Excerpt from the original Bill of Complaint]. The trial court ruled that since the City had construed the ordinance to require only that the line be brought to a dwelling, there was no taking of the wells of Homeowners.

Petitioners pursued their claim of unconstitutional taking in its petition for appeal to the Supreme Court of Virginia by questioning the validity of the ordinance and by specific

reference in their appellants' brief to the 5th and 14th Amendments. The Supreme Court of Virginia made light reference to the constitutional issue as follows:

> "Although the landowners raised the due process question, they wisely chose not to pursue it. Craft [Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E. 2d 153 (1955)] resolved the due process issue in the context of a mandatory termination of use of private wells; the present case involves no such mandatory termination." McMahon v. City of Virginia Beach, supra, 221 Va. ___, 267 S.E.2d 130,133 221 VRR 106, 110 (1980).

6. Reasons for Granting the Writ

> Petitioners have a constitutional right to the full use and enjoyment of their wells.

The Fourteenth Amendment provision which prevents any action by a state that would deprive a person of his property without due process of law protects such person from

oppressive city ordinances as well as state statutes. Gladstone v. Galton, 145 F.2d 742 (9th Cir. 1944); Tampa N. R. Co. v. Tampa, 91 Fla. 241, 107 So.364 (1926); George v. Portland, 114 Or. 418, 235 P. 681 (1925).

Municipal ordinances adopted under state authority constitute state action and are within the prohibitions of the Fourteenth Amendment. Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938). Thus the Virginia Beach mandatory connection ordinance must bear up under due process scrutiny.

The threshold question of the due process guaranty as it relates to property rights is what is property.

Since the Federal Constitution does not create property interests but rather provides safeguards to such interests, one must turn to state law, be it statutory, case law or whatever, to determine what is "property" that is entitled to such protection. Leis v. Flynt, 439 U.S. 438, 58 L.Ed.2d 717, 99 S.Ct. 698 (1979).

It is beyond argument that in Virginia the use and enjoyment of one's well and the water on one's land is "property." See Clinchfield Corp. v. Compton, 148 Va. 437, 139 S.E. 308 (1927); Couch v. Clinchfield Corp., 148 Va. 455, 139 S.E. 314 (1927); Heninger v. McGinnis, 131 Va. 70, 76, 108 S.E. 671 (1921).

Having determined that Petitioners have a "property" in their wells and the water derived therefrom, the next question is whether the City's mandatory connection ordinance "deprives" them of such property.

The City has taken the position that the Petitioners are not "deprived" of the use of their wells since it has administratively interpreted its ordinance to require the Homeowners to bring the water line to the dwelling, but not to have to bring the line into the dwelling. Deprivation, however, cannot be so narrowly construed.

> "The determination whether there has been a deprivation of property for purposes of

constitutional guaranties protecting against deprivation, is frequently difficult. Burdens and expenses may within reasonable and constitutional limits be imposed on property, and emergency invasions or limitations of the use of property have been sustained. Moreover, an act, in order to violate the guaranty of due process, must have some actual operations, and a provision of a state constitution which is only declaratory of what is in fact the law cannot unlawfully deprive a person of his property. But the concept of "confiscation" is opposed to the due process clause of the Fifth Amendment. And wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void. Thus, a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes, destroys or impairs its value, restricts or interrupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. The imposition of unreasonable conditions upon the use of property is

> unconstitutional as in effect depriving the owner of his property, even without any actual taking. In short, any significant taking of property by the state is within the purview of the due process clause of the Fourteenth Amendment, as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause. The prohibition is the constitution is as applicable where an owner is partially deprived of the use of his property as where he is wholly deprived of it; taking a part is as much forbidden as taking the whole." 16A Am.Jur. 2d, Constitutional Law, §586, pp. 511 et seq. (omitting citations).

The City ordinance requires Petitioners to pay a connection fee, to pay an installation fee, to pay a fee for the water line in the street based upon foot frontage and to pay a service fee. In addition, the Homeowners must employ the plumber to run the line from the City line to the dwelling. And all the time Petitioners have their supply of water. This

is certainly a "deprivation" within the constitutional context.

Therefore, except under the exercise of its police power, neither the State nor the City has the power to deprive Petitioners of their wells and the water taken therefrom.

When a statute is challenged on nonprocedural grounds as violative of due process, the question is whether there is some fair, just and reasonable connection between it and the promotion of the health, comfort, safety and welfare of society. Health Ins. Asso. v. Harnett, 44 N.Y. 2d 302, 405 N.Y.S. 2d 634, 376 N.E.2d 1280 (1978).

"To evaluate its reasonableness we... need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." Goldblatt v. Hempstead, 369 U.S. 590, 595, 82 S.Ct. 987, 990, 8 L.Ed.2d 130,

134 (1962).

In the instant case, the Virginia Supreme Court relied upon its holding in Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955), to the effect that legislation mandating termination of the use of private wells was immune to due process attack. In support of its holding Craft cited Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S.Ct. 290, 57 2.Ed 520 (1913). But Craft's reliance on Hutchinson was misplaced for Hutchinson found no due process violation of a mandatory sewer connection law.

That distinction was the basis of the decision in City of Midway v. Midway Nursing & Con. Ctr., Inc., 230 Ga. 77, 195 S.E.2d 452 (1973). There in 195 S.E.2d at 454 the Court stated:

> "We recognize the authorities cited...including Hutchinson v. City of Valdosta...relied on by the city in the present case, for the proposition that a municipal corporation may compel connection to a public

> drain or sewer in the exercise of its police power. However, the city cites no case supporting the proposition that a municipal corporation can dictate to its citizens the use of city supplied water....
>
> "In our opinion the very nature of the things involved requires a distinction between compelling the use of a city system to dispose of waste products, which may by their nature constitute a health hazard, and compelling the use of city-supplied water, whether it be for human consumption or otherwise. While we recognize that a municipality can, in the exercise of its police power, make reasonable regulations to protect its citizens, including measures designed to preclude the use of water unfit for human consumption or other use, as obtained from a user's private source, or as supplied to a user by others, we see no reason to recognize a claim for injunctive relief or declaratory judgment by the city absent some indication from the claim, as alleged, to show that some reasonable basis exists for protecting the health and welfare of its citizens in this manner."

The Craft holding was made in the context of a factual situation which disclosed that the subsurface wells involved were on lots where

septic tanks, cesspools and outdoor toilets were maintained and that the water from many of the wells involved (including the appellant's) had at one time or another been contaminated and unfit for human consumption. On the contrary here, the evidence is to the effect that both the quantity and quality of the Petitioners' well water was good. Therefore, Midway is more appropriate for a due process holding than Craft.

Moreover, it is not factually indicated that the police power mandates the affirmance of the Virginia Supreme Court's decision. On the one hand the City claims it is a legitimate health measure. Then in the same breath, they administratively construe the ordinance as not to require the ultimate connection to the dwelling. If the public health were the real concern, the connection would be required. In this regard, the Virginia Supreme Court missed the mark where it lauded the anticipatory nature of the non-connection

feature of the ordinance. But the same availability exists where the line passes the dwelling. Thus if it became necessary for a person to dispense with the use of his well and connect to the City water supply, he could just as easily then connect to the City line. The only difference is that the City ordinance requires an immediate monetary expense by the Homeowners, which enures to the benefit of the City.

Thus it is clear that far from being a legitimate health measure, Virginia Beach's ordinance is a poorly disguised monetary ordinance not authorized by the Fourteenth Amendment.

7. Conclusion

Petitioners' wells and the water therefrom are property of which they cannot be deprived without due process. The Virginia Beach ordinance imposes such restraints upon Petitioners as to deprive them of their property. While a valid exercise of the police power resulting in expense or loss of property is not

a taking of property without due process of law within the meaning of the Fourteenth Amendment, the ordinance in question is not such a valid exercise. It is not reasonably calculated to protect against a non-existent health menace. It is merely calculated to raise funds for the City to pay for the water system. As such it does not enjoy the protection of the Fourteenth Amendment and should be struck down.

Respectfully submitted,

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804 Plaza One Building
Norfolk, Virginia 23510

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of Virginia upon counsel for the Respondent, J. Dale Bimson, City Attorney, City of Virginia Beach, Municipal Center, Virginia Beach, Virginia 23456, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 3rd day of September, 1980.

PAUL M. LIPKIN
Of Counsel for
Petitioners

APPENDIX

APPENDIX A

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMITTEE TO SAVE OUR WELLS, et als

Plaintiffs

v. IN CHANCERY NO. C-77-1082

CITY OF VIRGINIA BEACH

Defendant

FINAL DECREE

THIS CAUSE came on to be heard upon a Bill of Complaint filed by the plaintiffs herein, upon the Stipulations of Facts and other evidence submitted by the parties as agreed, upon the evidence heard, ore tenus, on the 19th day of January, 1978, a transcript of which is hereby designated to be a part of the record herein, and upon briefs filed and argument of all counsel of record;

UPON CONSIDERATION WHEREOF, the Court having considered the evidence and the argument of counsel, it is accordingly ORDERED, ADJUDGED and DECREED as follows:

1. That the defendant's motion to strike the Committee to Save Our Wells as a party plaintiff is granted.

2. That Section 15.1-875 of the Code of Virginia allows a municipal corporation to require connection of premises with facilities provided for furnishing water, and that Section 15.1-873 of the Code of Virginia establishes that the power conferred in Section 15.1-875 is granted in order to secure, preserve and promote the health, safety, welfare, comfort, convenience, trade, commerce and industry in the municipality. The constitutionality of such a mandatory connection to water lines was upheld as valid in Weber City Sanitation Commission v. Craft, 196 Va. 140, 87 S.E. 2d 153 (1955).

The plaintiffs have argued the unreasonableness of the ordinance on the grounds of public health. However, health is not the only standard set forth in the statutory scheme. The primary issue is the reasonableness of the exercise of the statutory authority.

No evidence has been presented to show that the City acted in an arbitrary, unreasonable or capricious manner. The ordinance, which carries a presumption of validity, must stand.

3. That concerning the reasonableness of the fees imposed, the evidence showed that the charges in the Ordinance would not exceed the actual cost of lines in front of plaintiffs' homes, so it follows that there is a reasonable correlation between the peculiar benefit to the plaintiffs and the costs. The fact that the plaintiffs have an adequate water supply is not the controlling question. The mere availability of the city provided water supply conveys a peculiar benefit to plaintiffs.

4. Plaintiffs have made considerable argument that the charges imposed by the ordinance are special assessments and not fees. The Court is of the opinion that the City had the alternative of charging either fees or a special assessment. The charges herein are fees. But even if the charges were a special assessment, the

charges are reasonably correlated to the benefits conferred so they would pass as a special assessment.

5. Plaintiffs argue that the effect of the ordinance is to require disconnection of their homes from well water, thereby constituting a taking of private property without just compensation. The City contends the opposite. The City has chosen to administratively construe the ordinance as only requiring the bringing of a water line to a dwelling. There could be a cap on the line so there would be no City water flowing into the dwelling. The Court agrees with the City, in that there would be no necessity for promulgating the cross-connection portion of the Ordinance if the use of a well water supply were not permitted. The construction by the City of its own ordinance bears great weight, and the Court will give it that construction.

6. The administrative search provision of the Ordinance clearly deals with cross-connection in Section 37-40 of the Ordinance to protect the

City. It is quite possible in light of urgent health reasons that warrantless administrative searches would be constitutionally permissible. However, that issue is not before the Court. The City agrees that it has no right of entry except with a search warrant. The City is bound by its own construction of its ordinance.

7. The Court realizes that other points were raised and were considered but are not touched upon in the Court's order.

8. The execution of judgment is hereby stayed for a period of thirty (30) days to permit the plaintiffs to perfect their appeal to the Supreme Court of Virginia.

ENTER:

_____
Judge

I ask for this:

_____
Arthur Bergman, p.d.

Seen and excepted to:

_____
Edward R. Baird, Jr., p.q.

_____
Paul M. Lipkin, p.q.

APPENDIX B

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday, the 23rd day of October, 1978.

B. F. McMAHON, et al., Appellants,

against Record No. 781028
Circuit Court No. C-77-1082

City of Virginia Beach, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon the petition of B. F. McMahon and 242 other petitioners an appeal and suspension of judgment is awarded them from a judgment rendered by the Circuit Court of the City of Virginia Beach on the 28th day of April, 1978, in a certain chancery cause then therein depending, under the short style of: Committee to Save Our Wells, etc., et al. v. City of Virginia Beach; upon the petitioners, or some one for them, entering into bond with sufficient

security before the clerk of said court below in the penalty of $500, within 15 days of the date of this order, with condition as the law directs.

A Copy,

Teste:

/s/ Allen L. Lucy

Clerk

APPENDIX C

Present: All the Justices

B. F. McMAHON, ET AL.

-v- Record No. 781028

CITY OF VIRGINIA BEACH

OPINION BY JUSTICE
GEORGE M. COCHRAN
June 6, 1980

FROM THE CIRCUIT COURT OF
THE CITY OF VIRGINIA BEACH
Austin E. Owens, Judge

This appeal presents the question whether a city may by ordinance require landowners who possess adequate supplies of potable water provided by their privately owned wells to connect with the municipal water supply system when the ordinance does not require use of the city water.

In the trial court, the Committee to Save Our Wells, an unincorporated association, and more than 200 individual landowners,[1] including B. F. McMahon, filed a bill of complaint for declaratory judgment and injunctive relief

[1] In view of the large number of applicants, as a matter of convenience only the name of B.F. McMahon is individually listed herein.

against the City of Virginia Beach (the City). Plaintiffs sought an adjudication that the mandatory water connection ordinance adopted in 1977 by the City Council was unconstitutional and an injunction to prohibit the City and its agents from requiring plaintiffs to comply with the ordinance.

The parties agreed to a comprehensive stipulation of facts. An ore tenus hearing was also conducted and on April 28, 1978, the trial court entered a final decree dismissing the Committee to Save Our Wells as a party, and upholding the constitutionality and validity of the ordinance. The individual landowners have appealed, assigning error to the trial court's failure to rule that the City exceeded its power in adopting the ordinance requiring them to connect with the City's water system and to pay various water connection charges.

Prior to adoption of the ordinance the landowners, who reside in the various residential areas of the City, had at their own expense

installed wells varying in depth from 50 to 165 feet, sufficiently deep to avoid contamination from septic tanks. Tests of some of the wells, which the City made at the request of the owners, revealed no bacterial contamination. Although the testing program was not complete, the parties stipulated that the quantity and quality of the landowners' well water was good. It was further stipulated that each landowner had invested several hundred dollars in wells and related equipment, and that some of the landowners, before making such investment, had been informed by City personnel that the City did not require "hookups to City water nor did the City contemplate mandatory hookups".

The City has been concerned for many years with the problem of providing an adequate water supply for its residents. Under a contract expiring in 1993, the City purchases its water at a bulk rate from surplus supplies of the City of Norfolk. Numerous studies made by consultants, the United States Army Corps of

Engineers, and others, have addressed the water problem. In the summer of 1977, a serious drought in Tidewater Virginia caused the City and the City of Norfolk to impose mandatory water conservation measures. Nevertheless, there was evidence that the City of Norfolk had recently increased its own water resources and expanded its treatment facilities sufficiently to assure an abundant supply of water for both municipalities until the end of the contract period. The City, however, had employed engineers to study and recommend alternative sources of water to supplement the supply available under the contract. These alternatives included potable water that might be withdrawn from shallow wells, such as those of the landowners, and brackish water that might be withdrawn from deep wells and made potable by treatment in a proposed desalinization plant. Moreover, the City had found that its water distribution system was deficient, and presented potentially serious health problems, especially at the waterfront.

A capital improvement program was proposed to finance water and sewer lines. The City's financial consultants, in recommending that the City issue $20,000,000 in general obligation bonds, did not suggest a mandatory connection ordinance. Upon recommendation of the City Manager, however, approved by the financial consultants in a supplemental report, City Council in March, 1977, adopted a mandatory connection ordinance, providing in pertinent part as follows:

> Sec. 37-28. Connection required.
>
> The owner of any dwelling or other building in which human beings live or congregate shall, whenever a public water line hereafter is made available by the city, connect such building or dwelling with such water line within one year after such line becomes available.

The parties stipulated that the word "connection", as administratively construed by the City, means bringing the water service line to the dwelling. The line does not have to be brought into the dwelling but "should be readily

accessible if and when the supply is needed". It was further stipulated that the ordinance prohibited "the cross-connection between City and well water".

Section 37-29 of the City Code prescribed the applicable connection and installation fees, requiring a minimum fee of $220. This section also provided for payment of a fee for installation of a waterline in the street, the fee for the first 100 feet of frontage of a single-family residence lot being $500, plus $5 for each foot in excess of 100 feet. Thus, the minimum fees would be $220 and $500, respectively, or a total of $720.

The City estimated that the ordinance would require that approximately 4,500 dwellings be connected to the municipal water system, resulting in collection of fees aggregating $3,465,000 "plus or minus $1,000,000". Clearly, the average fee, based upon an estimated total of $3,465,000, would be $770, or slightly in

excess of the minimum. There was evidence that the average frontage of the landowners' lots exceeded 100 feet, and it was stipulated that the installation of the average eight-inch waterline in front of a dwelling cost $22 per linear foot. Thus the average cost of installing a waterline in the street abutting a landowner's property would be $2,200.

Included in the stipulation was the following:

> K. Well water -
>
> (1) Subsurface wells could at any time become polluted without prior knowledge of the City or the plaintiffs. The Norfolk Water System is routinely monitored for water quality under the National Safe Drinking Water Act.
>
> (2) A prolonged water table decline could make plaintiffs' wells inoperable.
>
> (3) A prolonged lack of electricity would render plaintiffs' wells useless.
>
> (4) A significant drawdown of ground water might create a salt water intrusion in the plaintiffs' wells.
>
> The likelihood of the foregoing to occur is small.

In its final decree the trial court ruled that Code § 15.1-875[2] authorized a city, under the police powers set forth in Code § 15.1-873[3] to require connection of premises with a municipal water system. The constitutionality of such a requirement, as the court noted, was upheld in Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955). In that case, pursuant to enabling legislation, a resolution required abutting property owners to connect

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[2] §15.1-875. Water supplies and facilities. A municial corporation may provide and operate within or without the municipal corporation water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of the inhabitants of the municipality; may contract with others for such purposes and services; may require the connection of premises with facilities provided for furnishing water; may charge and collect compensation for water thus furnished; and may provide penalties for the unauthorized use thereof.

[3] §15.1-873. Purposes for which powers conferred. - A municipal corporation, in order to secure, preserve and promote health, safety, welfare, comfort, convenience, trade, commerce and industry in the municipality, and among the inhabitants thereof, may exercise the powers and provide and operate the facilities and establishments set forth in this article.

with the public water system and to abandon the use of any privately owned well water. We held, relying upon Hutchinson v. City of Valdosta, 227 U.S. 303 (1913), that the resolution was a valid exercise of police power as a public health measure, and did not constitute a taking of property without due process of law.

The landowners conceded that the City under certain circumstances may require the use of public water if necessary to protect the health of its inhabitants. But they contend that the City cannot successfully argue that the ordinance, which requires them to connect with the water system but does not require them to use the water, is a valid health measure rather than an impermissible revenue-producing device. They distinguish Craft on this ground and additionally submit that in Craft there was evidence, not present in this case, that the private wells were located on lots where septic tanks, cesspools and outdoor toilets were maintained, and that some of the well water had occasionally been contaminated.

Although the landowners raised the due process question, they wisely chose not to pursue it. Craft resolved the due process issue in the context of a mandatory termination of use of private wells; the present case involves no such mandatory termination.

The landowners argue that even if the City can assess them with the cost of installing the waterlines in the streets abutting their properties it cannot charge connection fees until they elect to connect and use the City water. Contending that no reasonable relationship obtains between the connection fees and the police power of the City, the landowners assert that the charges, imposed upon them for a service that they neither need nor want, constitute invalid special assessments.

We consider first the question whether the ordinance is a legitimate health measure. The trial court found that there was no evidence that the City in the exercise of its statutory authority had acted arbitrarily, unreasonably or

capriciously, and accordingly affirmed the validity of the ordinance. We agree. A local governing body must necessarily enjoy broad discretionary powers to protect the public health and general welfare of its residents. To anticipate seemingly unlikely events, such as those included in Stipulation K, as public health hazards may be to exercise commendable prudence and foresight. There is no requirement that protective measures be limited to actions taken after a crisis has arisen or a catastrophic disaster has struck. Although Code § 15.1-873 designates other purposes which may justify the enactment of a mandatory connection ordinance pursuant to Code § 15.1-875, we find the public health purpose alone sufficient to support the conclusion that the present ordinance constitutes a valid exercise of the City's police power.

Moreover, the trial court found that because the charges imposed by the ordinance would not exceed the actual cost to the City of installing the waterlines in the streets in front of the

landowners' residences, a reasonable correlation arose between the benefit conferred and the cost exacted. This finding, which negates the landowners' contention that the ordinance was adopted solely as a revenue measure, is amply supported by the evidence. Accordingly, we hold that the ordinance is valid.

Inasmuch as the ordinance does not apply to vacant lots, we conclude that the trial court correctly ruled that the charges imposed by § 37-29 of the City Code are fees rather than special assessments. This ruling is consistent with our holding in Craft, where we rejected the argument that the mandatory connection resolution constituted a special assessment on abutting property owners that would have violated Section 170 of the 1902 Constitution of Virginia then in effect. The constitutional limitation on special assessments has been removed by Article X Section 3 of the 1971 Constitution, and Code § 15.1-239 now expressly permits special assessments for waterlines provided the assessments shall not

exceed the peculiar benefits to the properties. The trial court found that either as fees or as special assessments the charges reasonably corresponded to the peculiar benefits conferred, and this finding is supported by the evidence.

We find no merit in the landowners' argument, unsupported by any case authority, that the City is estopped from enforcing the ordinance as to them. See Segaloff v. Newport News, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968).

For the reasons assigned, we will affirm the decree of the trial court.

Affirmed.

APPENDIX D

List of Petitioners

B. F. McMahon, Mrs. B. F. McMahon, Ross L. Neagley, Mrs. Ross L. Neagley, Earl B. Chappell, Mrs. Earl B. Chappell, A. L. Land, Mrs. A. L. Land, K. J. Chapman, Mrs. K. J. Chapman, Conrad H. Reid, Mrs. Conrad H. Reid, W. D. Kelly, Mrs. W. D. Kelly, Cameron A. Lowe, Mrs. Cameron A. Lowe, Christian A. Lange, Mrs. Christian A. Lange, Raymond S. Howell, Mrs. Raymond S. Howell, Harry S. Riley, Mrs. Harry S. Riley, John C. Wood, Mrs. John C. Wood, Joseph C. McCarthy, Mrs. Joseph C. McCarthy, John D. DeJarnette, Mrs. John D. DeJarnette, Clovis K. McDonald, Mrs. Clovis K. McDonald, J. G. Horton, Mrs. J. G. Horton, Julian H. Nixon, Mrs. Julian H. Nixon, Peter J. Watson, Mrs. Peter J. Watson, Lewis D. Tamkin, Mrs. Lewis D. Tamkin, David L. Greenberg, Mrs. David L. Greenberg, Carl G. Reeves, Mrs. Carl G. Reeves, Janes N. Savage, Jr., Mrs. Janes N. Savage, Jr., Frank L. Etchison, Mrs. Frank L. Etchison, B. T. Bateman, III, Mrs. B. T. Bateman, III, C. K. Pease, Mrs. C. K. Pease, Jessie D. Kublmann, Mrs. Jessie D. Kublmann, Edward J. Quist, Mrs. Edward J. Quist, Mrs. Irma L. Masturzo, James T. Hayes, Mrs. James T. Hayes, William P. Miller, Mrs. William P. Miller, Paul Miller, Mrs. Paul Miller, Ralph H. Womeldorf, Mrs. Ralph H. Womeldorf, H. W. England, Mrs. H. W. England, Valville L. Sutoon, Mrs. Valville L. Sutton, Billy C. Maurice, Mrs. Billy C. Maurice, Florence I. Armstrong, Sarah E. Armstrong, Charles A. Lamborn, Mrs. Charles A. Lamborn, Harvey Simsohn, Mrs. Harvey Simsohn, Maurice F. Connor, Mrs. Maurice F. Connor, Dixie W. Moore, Jr., Mrs. Dixie W. Moore, Jr., P. F. Avant, Jr., Mrs. P. F. Avant, Jr., Norman E. Jones, Mrs. Norman E. Jones, Joseph A. Daniel, Jr., Mrs. Joseph A. Daniel, Jr., Albert D. Petrulis, Mrs. Albert D. Petrulis, Wilfred A.

Sechrist, Mrs. Wilfred A. Sechrist, S. W. Cromwell, Mrs. S. W. Cromwell, W. C. Saunders, Mrs. W. C. Saunders, Howard Wallace, Mrs. Howard Wallace, Charles E. Schuldt, Mrs. Charles E. Schuldt, John E. Monacc, Mrs. John E. Monacc, Levi Old, Jr., Mrs. Levi Old, Jr., H. B. Patterson, Jr., Mrs. H. B. Patterson, Jr., Julia P. Aaron, James K. Gorman, Mrs. James K. Gorman, C. W. Mercer, Mrs. W. C. Mercer, John W. Musick, Mrs. John W. Musick, Jack Rhymer, Mrs. Jack Rhymer, A. G. Melson, Mrs. A. G. Melson, John J. Gordon, Mrs. John J. Gordon, Vernon P. Brooks, Mrs. Vernon P. Brooks, Perez A. Brooks, Mrs. Susie R. Johnson, Albert W. Balko, Mrs. Albert W. Balko, Jesse S. Morse, Mrs. Jesse S. Morse, R. F. DiPalma, Mrs. R. F. DiPalma, Mrs. Q. T. Ranhorne, Ronald B. Brown, Mrs. Ronald B. Brown, June F. Wareing, Samuel T. Carpenter, Mrs. Samuel T. Carpenter, Lettie E. Gregory, R. L. Miles, Jr., Mrs. R. L. Miles, Jr., Edward T. Miles, Mrs. Edward T. Miles, James G. Snider, Mrs. James G. Snider, Roy L. Edwards, Mrs. Roy L. Edwards, Earl D. Morris, Mrs. Earl D. Morris, W. Selden Grandy, Mrs. W. Selden Grandy, A. Jack Filyaw, Jr., Mrs. A. Jack Filyaw, Jr., Edward McIntosh, Mrs. Edward McIntosh, Margaret Rommen, George L. Dix, Mrs. George L. Dix, Robert A. Hogsed, Mrs. Robert A. Hogsed, Frank E. Parrish, Mrs. Frank E. Parrish, Robert L. Twiddy, Mrs. Robert L. Twiddy, Mrs. Geneva H. Kinzie, Daniel H. Kinzie, Mrs. Daniel H. Kinzie, P. W. Malpass, Mrs. P. W. Malpass, William D. Malpass, Sr., Mrs. William D. Malpass, Sr., George P. Hand, Jr., Mrs. George P. Hand, Jr., A. A. Hastoglis, Mrs. A. A. Hastoglis, Cecil A. Weekley, Mrs. Cecil A. Weekley, Jehu L. Dancy, Mrs. Jehu L. Dancy, Mrs. E. Lynn Farmer, Wm. C. Chapin, Mrs. Wm. C. Chapin, Dwight D. Timm, Philip A. Jones, Mrs. Philip A. Jones, Robert Earl Anglin, Mrs. Robert Earl Anglin, H. T. Garrison, Mrs. H. T. Garrison, Richard T. Bowie, Mrs. Richard T. Bowie, Elizabeth Berwind, Margaret S. Berwind, Deming W. Smith, Mrs.

Deming W. Smith, D. A. Harrison, Mrs. D. A. Harrison, David Wesley Hoffman, Mrs. David Wesley Hoffman, Jean B. Glass, G. L. Sundstrom, Mrs. G. L. Sundstrom, Abraham McKool, Mrs. Abraham McKool, John A. Tinkham, Mrs. John A. Tinkham, Emory W. Brown, Jr., Mrs. Emory W. Brown, Jr., G. McFarland, Mrs. G. McFarland, Thomas V. Joynt, Mrs. Thomas V. Joynt, A. I. Waddington, Mrs. A. I. Waddington, James E. Stivers, Mrs. James E. Stivers, Kenneth P. Butt, Jr., Mrs. Kenneth P. Butt, Jr., William J. Roper, Mrs. William J. Roper, W. C. Henwood, Mrs. W. C. Henwood, R. E. Brickhouse, Mrs. R. E. Brickhouse, W. W. Marshall Mrs. W. W. Marshall, Bobby P. Spruill, Mrs. Bobby P. Spruill, Lonnie E. Blume, Mrs. Lonnie E. Blume, R. Kendall Allen, Mrs. R. Kendall Allen, Wayne Rowe, Mrs. Wayne Rowe, J. A. Wright, Mrs. J. A. Wright, Stewart Smokler, Mrs. Stewart Smokler, Douglas G. Dickerson, Mrs. Douglas G. Dickerson, Richard C. Dickerson, Mrs. Richard C. Dickerson, Lyman C. Dickerson, Mrs. Lyman C. Dickerson, Mrs. Eleanor A. Johansson, Richard L. Teleis, Mrs. Richard L. Teleis, William L. Swingle and Mrs. William L. Swingle.